Re Zainur Zakaria

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NOS 45–48 OF 1998 AND 45–49 OF 1998
AUGUSTINE PAUL J
26 MAY 1999

Criminal Procedure *— Contempt of court — Contempt in the face of court — Advocate and solicitor filing contemptuous motion on behalf of client — Whether explanation that advocate and solicitor acting on instructions of client sufficient explanation — Whether intent to interfere with due administration of justice essential*

Criminal Procedure *— Contempt of court — Contempt in the face of court — Sentencing for contempt — Advocate and solicitor filing contemptuous motion on behalf of client — Factors to be considered by court — Whether custodial sentence appropriate*

Criminal Procedure *— Contempt of court — Contempt in the face of court — Summary power to deal with — Opportunity to be heard — Whether calling of witnesses on behalf of contemnor necessary — Onus on contemnor to satisfy court of need for calling witnesses — Onus on contemnor to satisfy court of his explanation — When summary power to be exercised — Procedure to be followed*

Legal Profession *— Duty to court — Advocate and solicitor filing contemptuous motion on behalf of client — Whether advocate and solicitor's duty to client paramount to his duty to court*

Dato' Seri Anwar bin Ibrahim ('the accused') — charged with four offences under s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 — had on 28 November 1998 filed a notice of motion ('the motion') through the law firm of Messrs Zainur Zakaria & Co praying for an order that the senior deputy prosecutors Dato' Abdul Gani Patail ('AGP') and Encik Azahar bin Mohamed ('Azahar') — two members of the prosecution team — be prevented, prohibited or discharged from further prosecuting the case and that the matter of their conduct be referred to the Attorney General for appropriate action. The motion was supported by an affidavit affirmed by the accused, which in turn was based on a statutory declaration ('the SD') affirmed by one Manjit Singh Dhillon ('MSD'), an advocate and solicitor, and a letter MSD had written to the Attorney General alleging improper prosecution in the case of *Pendakwaraya v Nallakaruppan a/l Solaimalai* ('the Nallakaruppan trial'). The SD and letter were written by MSD, counsel for Nallakaruppan, as a result of meetings he had had with the Attorney General, AGP and Azahar in relation to the Nallakaruppan trial wherein he sought the reduction of charges against Nallakaruppan. The accused's affidavit referred to the SD and letter and alleged, inter alia, that both AGP and Azahar had requested Nallakaruppan to falsely implicate him (the accused) in the commission of sexual offences with various married and unmarried women. The affidavit further alleged that both AGP and Azahar had abused their position and gone out of their way to fabricate evidence

against the accused, in order that more charges could be preferred against him. It was further averred that the involvement of both the prosecutors raised grave doubts as to the evidence already adduced by the prosecution in the accused's trial. When the motion came up for hearing on 30 November 1998, the learned judge informed the parties that he intended to commence proceedings for contempt of court against En Zainur Zakaria ('ZZ') for having filed the motion and affidavit. In order to re-evaluate the contemptuous contents of the motion, the learned judge asked ZZ a series of questions. The learned judge, not being satisfied with the answers, proceeded to cite ZZ for contempt for having attempted to undermine the integrity of the trial. The contemnor, ZZ, was given an opportunity to tender an unconditional apology but refused to do so. The contemnor was then asked to show cause and in doing so said that he had filed the motion upon instructions of the accused, his client. The contemnor's application to call evidence was rejected by the court and after hearing submissions, the contemnor was again given the opportunity to apologize to which he again refused.

Held, convicting the contemnor and sentencing him to three months' imprisonment:

(1) In proceedings for contempt in the face of the court, all the circumstances of the contempt are in the personal knowledge of the court and generally the need for witnesses to be called does not arise. The onus is on the contemnor to satisfy the court of the existence of witnesses who would be able to support his explanation. If however the explanation is not acceptable to the court, then the question of calling witnesses in support of the explanation cannot arise. On the facts, ZZ had requested an adjournment to adduce evidence to show that the meeting between AGP and MSD did in fact take place. However, the whole basis of the contempt proceeding instituted against ZZ was anchored on what had transpired at the meeting between AGP and MSD based on documents filed by ZZ which the court had accepted. Thus, the need to call further witnesses to show that the meeting did in fact take place was unnecessary as the meeting was not in dispute (see pp 606G–607B).

(2) On the facts, the averment based on MSD's letter that AGP had requested Nallakaruppan to fabricate evidence could not be justified. ZZ who was aware or ought to have been aware of the contents of the exh ID14B — which threw some light on the involvement of Nallakaruppan with the accused — should not have accepted MSD's conclusion as stated in his letter (see pp 599H–600A).

(3) On the facts, the allegations against the prosecutors amounted to contempt of court on exactly the same principles applicable with regard to criticism of a judge. The allegation that the involvement of the two prosecutors in the instant case raised grave doubts as to

A the integrity of the evidence would seriously affect public confidence in the trial. Thus, the filing of the motion by ZZ was scandalous, frivolous, vexatious and an abuse of the process of the court with the objective of undermining the integrity of the trial and amounted to a contempt in the face of the court (see p 601D–E).

B (4) It was urgent and imperative to invoke the summary procedure on the facts of the case to ensure that the trial in progress was brought to a proper and dignified end without disturbance, and to protect the interests of the public by ensuring that the integrity of the trial in progress was maintained. The filing of the application by ZZ C further had the tendency to deflect the court from determining the issues exclusively by reference to the evidence. That amounted to contempt of court which in the circumstances required immediate attention (see pp 601H–602F).

(5) Whatever may be the duty of an advocate and solicitor to his client, his duty to the court remains paramount in the D administration of justice (see p 603C–F). Instructions from a client are insufficient to protect an advocate and solicitor when he makes a contemptuous application, as was done in the instant case. On the facts, the explanation offered by ZZ that he filed the motion on his client's instructions could not be sustained in law. E The court was satisfied beyond reasonable doubt of ZZ's contempt and accordingly found him guilty (see p 606C–D).

(6) In sentencing ZZ, the court took into consideration various factors, namely: the high degree of recklessness displayed by ZZ in filing a motion without giving any consideration to its effect; that the contempt had the effect of undermining the integrity of F the trial and eroding public confidence in the administration of justice; and the attitude of ZZ in refusing to apologize notwithstanding the clear explanation of all aspects of the law and the facts to him. The court was unable to accept ZZ's plea in mitigation that he had no intention to commit contempt given his high degree of recklessness. The court was of the view that in the G interests of the public a custodial sentence was essential and therefore convicted ZZ and sentenced him to three months' imprisonment (see pp 607D–608B).

H **[Bahasa Malaysia summary**

Dato' Seri Anwar bin Ibrahim ('tertuduh') — yang dituduh untuk empat kesalahan di bawah s 2(1) Ordinan Darurat (Kuasa-Kuasa Perlu) No 22 tahun 1970 — telah pada 28 November 1998 memfailkan notis usul ('usul tersebut') melalui firma Tetuan Zainur Zakaria & Co memohon untuk perintah bahawa timbalan-timbalan I kanan pendakwa raya Dato' Abdul Gani Patail ('AGP') dan En Azahar bin Mohamed ('Azahar') — dua ahli kumpulan pendakwaan — dihalang, dilarang dan dilepaskan daripada

mendakwa selanjutnya kes tersebut dan bahawa perkara mengenai kelakuan mereka dirujuk kepada Peguam Negara untuk tindakan yang sewajarnya. Usul tersebut disokong oleh afidavit yang diikrarkan oleh tertuduh dan berdasarkan kepada akuan berkanun ('AB tersebut') yang diikrar oleh seorang peguambela dan peguamcara, Manjeet Singh Dillon ('MSD'), dan sepucuk surat yang ditulis oleh MSD kepada Peguam Negara yang mengatakan terdapat pendakwaan yang salah dalam kes *Pendakwaraya v Nallakaruppan a/l Solaimalai* ('perbicaraan Nallakaruppan tersebut'). Kedua-dua AB dan surat tersebut telah ditulis oleh MSD, peguam untuk Nallakaruppan, hasil dari pertemuannya dengan Peguam Negara, AGP dan Azahar berkenaan dengan perbicaraan Nallakaruppan. Afidavit tertuduh telah merujuk kepada SD dan surat tersebut dan mengatakan antara lain, bahawa kedua-dua AGP dan Azahar telah meminta Nallakaruppan untuk membabitkan beliau (tertuduh) secara palsu dalam perbuatan melakukan jenayah seks dengan berbagai wanita yang telah berkahwin dan wanita yang belum berkahwin. Selanjutnya, afidavit juga mengatakan bahawa kedua-dua AGP dan Azahar telah menyalahgunakan kedudukan mereka dan telah bertindak di luar bidang kuasa dengan memalsukan keterangan terhadap tertuduh, supaya lebih banyak tuduhan boleh dibawa terhadapnya. Selanjutnya, ia juga ditegaskan bahawa penglibatan kedua-dua pendakwa telah menimbulkan keraguan yang mendalam mengenai keterangan yang telah dikemukakan oleh pihak pendakwaan di dalam perbicaraan tertuduh. Apabila usul tersebut dibangkitkan untuk pendengaran pada 30 November 1998, hakim yang arif telah memberitahu pihak-pihak berkenaan bahawa beliau berniat untuk memulakan prosiding untuk penghinaan mahkamah terhadap En Zainur Zakaria ('ZZ') kerana memfailkan usul dan juga afidavit tersebut. Untuk menilai semula bahan-bahan penghinaan di dalam usul tersebut, hakim yang arif telah menanya ZZ pelbagai persoalan. Hakim yang arif, oleh kerana tidak berpuas hati dengan jawapan-jawapan tersebut, telah selanjutnya menamakan ZZ bagi penghinaan kerana cuba menjejaskan integriti perbicaraan. Penghina mahkamah, ZZ, telah diberi peluang untuk meminta maaf secara tidak bersyarat tetapi beliau enggan melakukannya. Kemudian, penghina mahkamah telah diminta untuk menunjukkan sebab dan beliau telah mengatakan bahawa beliau memfailkan usul tersebut atas arahan tertuduh, kliennya. Permohonan penghina mahkamah untuk membawa masuk keterangan lain telah ditolak mahkamah dan selepas mendengar hujah-hujah, penghina mahkamah sekali lagi diberikan peluang untuk meminta maaf yang mana beliau enggan.

Diputuskan, mensabitkan penghina mahkamah dan beliau dijatuhkan hukuman penjara selama tiga bulan:

(1) Dalam prosiding penghinaan di hadapan mahkamah, semua keadaan penghinaan adalah di dalam pengetahuan peribadi

A mahkamah dan secara am keperluan untuk saksi-saksi dipanggil tidak timbul. Beban adalah terletak ke atas penghina mahkamah untuk memuaskan mahkamah mengenai kewujudan saksi-saksi yang boleh menyokong penjelasannya. Namun, jika penjelasan tersebut tidak boleh diterima oleh mahkamah, maka persoalan memanggil saksi-saksi untuk menyokong penjelasan tidak timbul.
B Menurut fakta, ZZ telah meminta penangguhan untuk mengemukakan keterangan untuk menunjukkan bahawa mesyuarat antara AGP dan MSD telah berlaku. Namun, dasar keseluruhan prosiding penghinaan yang dibawa terhadap ZZ adalah berdasarkan apa yang berlaku semasa pertemuan AGP
C dengan MSD yang berdasarkan kepada dokumen yang difailkan oleh ZZ yang mahkamah telah terima. Oleh itu, keperluan untuk memanggil saksi-saksi yang selanjutnya untuk menunjukkan bahawa pertemuan benar-benar telah berlaku adalah tidak perlu kerana pertemuan tersebut tidak dipertikaikan (lihat ms 606G–607B).

D (2) Di atas fakta, penegasan yang berdasarkan surat MSD bahawa AGP telah meminta Nallakaruppan untuk memalsukan keterangan tidak boleh dijustifikasikan. ZZ yang sedar atau patut sedar mengenai kandungan di dalam eksh ID14B — yang telah menerangkan sedikit sebanyak mengenai pembabitan Nallakaruppan dengan tertuduh — tidak patut menerima
E kesimpulan MSD yang telah dinyatakan di dalam suratnya (lihat ms 599H–600A).

(3) Di atas fakta, pengataan terhadap pendakwa-pendakwa terjumlah kepada penghinaan mahkamah di atas prinsip-prinsip seperti yang terpakai untuk kritikan terhadap seorang hakim. Pengataan
F bahawa pembabitan kedua-dua pendakwa di dalam kes telah menimbulkan keraguan yang mendalam mengenai integriti keterangan akan menjejaskan keyakinan orang awam terhadap perbicaraan. Oleh itu, pemfailan usul oleh ZZ adalah remeh, menyusahkan atau menindas dan merupakan penyalahgunaan
G proses mahkamah dengan tujuan untuk menjejaskan integriti perbicaraan, serta terjumlah kepada penghinaan di hadapan mahkamah (lihat ms 601D–E).

(4) Adalah penting dan mustahak untuk menggunakan prosedur terus berdasarkan fakta kes untuk memastikan bahawa perbicaraan yang sedang dijalankan dibawa ke suatu keadaan
H yang wajar dan dihormati tanpa gangguan dan untuk melindungi kepentingan awam dengan memastikan bahawa integriti perbicaraan yang sedang dijalankan dikekalkan. Pemfailan permohonan oleh ZZ selanjutnya mempunyai kecenderungan untuk memesong mahkamah daripada menentukan isu secara eksklusif dengan merujuk kepada keterangan. Ia terjumlah kepada
I penghinaan mahkamah di mana dalam keadaan kes ini memerlukan perhatian segara (lihat ms 601H–602F).

(5) Tidak kira apa tugas seorang peguamcara dan peguambela kepada kliennya, tugasnya kepada mahkamah kekal sebagai keutamaan di dalam pentadbiran keadilan (lihat ms 603 C–F). Arahan daripada klien adalah tidak mencukupi untuk melindungi seorang pegumabela dan peguamcara apabila beliau membuat permohonan yang menghina mahkamah, seperti yang dilihat di dalam kes ini. Di atas fakta, penjelasan yang diberikan oleh ZZ bahawa dia memfailkan usul atas arahan kliennya tidak boleh disokong menurut undang-undang. Mahkamah telah berpuas hati melampaui keraguan munasabah bahawa ZZ menghina mahkamah dan dengan itu mendapati bahawa beliau adalah bersalah (lihat ms 606C–D).

(6) Dalam menghukum ZZ, mahkamah telah mempertimbangkan pelbagai faktor, iaitu: tahap melulu yang begitu tinggi ditunjukkan oleh ZZ dalam memfailkan satu usul tanpa mempertimbangkan kesannya; bahawa penghinaan mempunyai kesan menjejaskan integriti perbicaraan dan juga menjejaskan keyakinan awam dalam pentadbiran keadilan; dan sikap ZZ yang enggan meminta maaf walaupun penjelasan adalah jelas mengenai undang-undang dan fakta kepadanya. Mahkamah tidak dapat menerima rayuan ZZ untuk meringankan hukuman bahawa beliau tidak berniat untuk menghina mahkamah memandangkan tahap melulunya yang begitu tingi. Mahkamah berpendapat bahawa atas kepentingan awam satu hukuman penjara adalah perlu dan oleh itu, ZZ disabitkan dan dihukum tiga bulan penjara (lihat ms 607D–608B).]

Notes

For cases on contempt of court generally, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1011–1035.

For a case on duty of advocate and solicitor to court, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1451.

Cases referred to

Apted v Apted and Bliss [1930] P 246 (refd)

Attorney General v Butterworth [1963] 1 QB 696 (refd)

Attorney General v Hislop & Anor [1991] 1 All ER 911 (refd)

Attorney General, Malaysia v Manjeet Singh Dhillon [1991] 1 MLJ 167 (refd)

Attorney General v Times Newspapers Ltd [1974] AC 273 (refd)

Babu Dwarka Mithal, In the Matter of AIR 1924 All 253 (refd)

Balogh v St Alban's Crown Court [1974] 3 All ER 283 (refd)

Bell v Stewart (1920) 28 CLR 419 (refd)

Chandra Sri Ram v Murray Hiebert [1997] 3 CLJ Supp 518 (refd)

Cheah Cheng Hoc v PP [1986] 1 MLJ 299 (refd)

Cotroni v Quebec Police Commission and Brunet (1977) 80 DLR (3d) 490 (refd)

A
Dean's Case (1598) Cro Eliz 689 (refd)
DPP v Wran [1987] 7 NSWLR 618 (refd)
Gill v Lougher (1830) 148 ER 1379 (refd)
Evening Standard Co Ltd; ex p Attorney General [1954] 1 All ER 1026 (refd)
Geoffrey Silver & Drake v Thomas Anthony Baines [1971] 1 All ER 473 (refd)
B
Hamilton v Anderson (1858) 3 Macq 363 (HL) (refd)
I Sham Lal, In the matter of [1932] PLR 785 (refd)
Izuora (Joseph Orakwue) v R [1953] AC 327 (refd)
Jaginder Singh & Ors v Attorney General [1983] 1 MLJ 71 (refd)
Johnson, Re (1887) 20 QBD 68 (refd)
C
Karam Singh v PP [1975] 1 MLJ 229 (refd)
Kumaraendran, Re[1975] 2 MLJ 45 (refd)
Linwood v Andrews and Moore (1888) 58 LT 612 (refd)
Morris v Crown Office [1970] 2 QB 114 (refd)
Myers v Elman [1939] 4 All ER 484 (refd)
D
MY Shareef & Anor v Hon'ble Judges of the Nagpur High Court AIR 1955 SC 19 (refd)
Parashuram Detaram Shamdasani v King-Emperor [1945] AC 264 (refd)
Phola Nath Chaudhary, Contemnor, In the Matter of AIR 1961 Pat 1 (refd)
E
PP v Seeralan [1985] 2 MLJ 30 (refd)
R v Collins [1954] VLR 46 (refd)
R v Dolan [1907] 2 IR 260 (refd)
R v Gray [1900] 2 QB 36 (refd)
R v Gregory (1843) 1 Cox CC 31 (refd)
R v Griffin (1988) 88 Cr App R 63 (refd)
F
R v Griffiths & Ors; ex p Attorney General [1957] 2 All ER 379(refd)
R v Murphy [1969] 4 DLR (3d) 289 (refd)
R v Odham's Press Ltd Ors; ex p Attorney General [1956] 3 All ER 494; [1957] 1 QB 73 (refd)
R v Phillips (Peter) (1983) 78 Cr App Rep 88 (refd)
G
R v Thomson Newspapers Ltd & Ors; ex p Attorney General [1968] 1 All ER 268 (refd)
R v Weisz; ex p Hector & Anor [1951] 2 All ER 408 (refd)
Read and Huggonson, Re (1742) 26 ER 683 (refd)
Shaw & Shaw Ltd v Lim Hock Sim (No 2) [1958] MLJ 129 (refd)
Skipworth's and the Defendant's case (1873) LR 9 QB 230 (refd)
H
Superintendent and Remembrances of Legal Affairs Bihan v Murali Manohan Prasad (1941) 42 CLJ 225 (refd)
Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v SM Idris & Anor and another application [1990] 1 MLJ 273 (refd)
Tulsidar Amanmal Karani, Re [1941] ILR Bom 548 (refd)
VW Vidyasagara v R [1963] AC 589 (refd)
I
Yee Chang & Co Ltd v NV Koninklijke Paketvaart Maatschappij [1958] MLJ 131 (refd)
Yusof Ali Khan v State [1970] PLD 350 (refd)

Legislation referred to

Legal Profession (Practice and Etiquette) Rules 1978 rr 9(a), 16, 36

Raja Aziz Addruse (*Haji Sulaiman Abdullah, Christopher Fernando, Gurbachan Singh Pannu, Sankara N Nair, Pawan Cheek Marican, Ainiah Kamaruzaman, Zulkifli Nordin* and *Robyn Choi* with him) (*Raja Aziz Addruse*) for the applicant.

Mohtar Abdullah (*Abdul Gani Patail, Azahar bin Mohamed, Mohd Yusof Zainal Abidin, Stanley C Augustin, Nordin Hassan* and *Shamsul Sulaiman* with him) (Attorney General's Chambers) for the prosecution.

Augustine Paul J: On 28 November 1998, Dato' Seri Anwar bin Ibrahim ('the accused'), the former deputy Prime Minister and Minister of Finance, Malaysia who was being tried before me for four offences under s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 filed a notice of motion ('the motion') through the law firm of Messrs Zainur Zakaria & Co praying for an order that:

(a) senior deputy public prosecutors, Dato' Abdul Gani Patail ('AGP') and En Azahar bin Mohamed, be prevented or prohibited or discharged from further prosecuting in this case; and

(b) the matter of the conduct of the two said senior deputy public prosecutors be referred to the Attorney General with a view to such action as may be appropriate to be taken against them.

The motion was supported by an affidavit ('the affidavit') affirmed by the accused. The material parts of the affidavit read as follows:

> para 13
>
> I am advised by one of my counsel in my trial herein, that the evidence which Mr Manjeet Singh Dhillon had sought to give in the Nallakaruppan trial is as stated in a statutory declaration which he had affirmed on 9 November 1998, and is to the effect:
>
> (a) that at a meeting he had at the Attorney General's Chambers on 2 October 1998 (when he had requested that the charge against Datuk Nallakaruppan be reduced to one which is not punishable with the death penalty), the aforesaid Dato' Abdul Gani Patail had indicated that he would consider the request if Datuk Nallakaruppan was prepared to co-operate with the Attorney General's Chambers by falsely implicating me in the commission of sexual offences with various married and unmarried women;
>
> (b) that present at this meeting was Mr Balwant Singh Sidhu, co-counsel for Datuk Nallakaruppan;
>
> (c) that En Azhar bin Mohamed, another senior deputy public prosecutor subsequently made a similar demand as Dato' Abdul Gani Patail to Mr Manjeet Singh Dhillon;
>
> (d) that an account of what had transpired at the meeting aforesaid had been set out in a letter which Mr Manjeet Singh Dhillon had sent to the Attorney General dated 12 October 1998, to which he had yet to receive a reply from the Attorney General.

A Now produced and shown to me is the said statutory declaration of Mr Manjeet Singh Dhillon affirmed on 9 November 1998, herein marked exh 'DSAI-2'.

para 16

Their conduct referred to above shows both Dato' Abdul Gani Patail and
B En Azahar bin Mohamed to have abused their position as officers of the Attorney General's Chambers and as prosecutors in my trial herein, by going out of their way to get Datuk Nallakaruppan to fabricate evidence in order to prefer more charges against me for other alleged sexual offences.

para 18

C Having shown themselves to be highly unprofessional in the performance of their duties and to be personally interested to secure my conviction by questionable means, their involvement in my trial herein has already raised grave doubts as to the integrity of the evidence which has so far been adduced by the prosecution.

D The affidavit is based on a statutory declaration ('the SD') affirmed by one Mr Manjeet Singh Dhillon ('MSD'), an advocate and solicitor, and a letter ('the letter') that he had written to the Honourable Attorney General. The material parts of the SD read as follows:

I, Manjeet Singh Dhillon (NRIC No 0248545) of c/o Room 308, 3rd Floor, Bangunan Yayasan Selangor, Jalan Bukit Bintang, 55100 Kuala Lumpur, of
E full age and a Malaysian citizen, do hereby declare and say as follows:

(1) I am an Advocate & Solicitor of the High Court of Malaya with an address for practice at Room 308, Bangunan Yayasan Selangor, Jalan Bukit Bintang, 55100 Kuala Lumpur and the facts deposed to in this statutory declaration are within my own knowledge.

F (2) I am retained as counsel for Dato Nallakaruppan a/l Solaimalai in Kuala Lumpur High Court Criminal Trial No 45-40-1998 which is scheduled for hearing from 9 November 1998 onwards.

(3) I wrote the letter annexed hereto as MSD-1, the contents of which are self-explanatory, and delivered it personally to the Hon'ble Attorney General Tan Sri Mohtar Abdullah on 12 October 1998 at about 9.30 am.

G (4) Pursuant to the letter being delivered and as a result of an invitation from him to do so, I met with the Hon'ble A-G at about 11.00 am on 13 October 1998. This invitation to meet him, alone, was conveyed through his secretary.

(5) At the meeting, the Hon'ble A-G never questioned or disputed my allegations against Dato Gani Patail. Instead the conversation covered,
H among other things, the work that he, the Hon'ble A-G, was doing to improve the set-up and efficiency of this department. Only at the tail end of our meeting did the Hon'ble A-G allude to my letter and say that the letter was not very clear as to how my client would plead to an amended charge under the Arms Act. My response to that was that the client would enter a plea of guilty to an amended charge under the Arms Act. He asked
I for a letter confirming this and said that either he or Azahar would revert to me after that.

(6) On 14 October 1998 I wrote a short letter to the Hon'ble A-G confirming my statement that the client would plead guilty. A copy of this letter is annexed hereto as MSD-2.

(7) I telephoned and spoke to the Azahar indicated by the Hon'ble A-G. This was on 16 October 1998. The 'Azahar' in question is En Azahar bin Mohamed, Ketua Bahagian Pendakwaan. Encik Azahar confirmed receipt of my letter dated 14 October 1998 and he knew about my meeting with the Hon'ble A-G on 13 October 1998. He went on, in the same conversation, to state, that there would have to 'be something else (*ie more than just a plea of guilt to an amended charge*)' and that he would revert when he had instructions. This 'something else' asked for by En Azahar was obviously what Dato Gani had asked for on 2 October 1998 and confirmed to me a common approach to extracting evidence from Nallakaruppan a/l Solaimalai by using the ISA 'death threat' as their bargaining chip.

(8) I had conveyed Dato Gani's demands to my client on the afternoon of 13 October 1998. There was little that Nallakaruppan could have done to satisfy Dato Gani or Azahar since he had nothing to give them that would have matched their demands, short of lying.

(9) I did not hear from the Hon'ble A-G or En Azahar and so on or about 21 October 1998 I telephoned and spoke to the Hon'ble A-G. He said that he had made no decision and asked for a further week.

(10) There was no further response and so on 28 October 1998, I sent the Hon'ble A-G a reminder. I received a reply dated 29 October 1998 signed by En Azahar bin Mohamed rejecting the request for an amendment of the charge. This rejection letter is annexed hereto as MSD-3.

and I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declarations Act 1960.

The material parts of the letter that MSD wrote to the Honourable Attorney General read as follows:

Manjeet Singh Dhillon
Advocate & Solicitor

Room 308, 3rd Floor
Bangunan Yayasan Selangor
Jalan Bukit Bintang, 55100
Kuala Lumpur
Malaysia
Tel: (603)2424308
Fax: (603)2418472
e-mail: dhillon@tm.net.my

your ref: not known
our ref: MSD/D/Nallakaruppan/98

YAB Tan Sri Mohtar bin Abdullah
Peguam Negara
Bangunan Bank Rakyat
Jalan Tangsi
Kuala Lumpur

Private & Confidential

12 October 1998
Personal/For your eyes only by hand

A Tan Sri,

Re: PR lwn Nallakaruppan a/l Solaimalai
KL High Court Criminal Trial No 45-40-98

At the very outset, let me apologize for writing this letter in English. I would under normal circumstances have arranged for my staff to translate it into
B Bahasa but there are matters that I am about to set out that for the moment I feel are best left on a p & c basis. Hence the need to keep the letter away from my staff. I have even taken the precaution of hand-delivering this letter myself.

You will recollect that I wrote to you on 1 October 1998 on the above matter citing the recent prosecution of Samsuri Welch Abdullah under the Arms Act 1960 as a comparative basis for you to amend the charge against
C Nallakaruppan from the Internal Security Act 1960 to one under the Arms Act 1960. I had copied that letter to Dato Gani Patail. I had expected a response from your office but instead, as in the case of my first letter dated 17 August 1998, I had a call from Dato Gani Patail on 2 October 1998 asking to see me on a very urgent basis. Both Mr Balwant Singh Sidhu and I saw him at 3.20 pm on 2 October 1998. The date and time of this visit is recorded in
D the police log book maintained outside Dato Gani's office on the 17th floor of Bangunan Bank Rakyat.

I had gone to this meeting with the expectation that, on the basis of my 1 October letter, there would be some discussion about possible sections under the Arms Act 1960 with a view to an amendment of Nallakaruppan's present ISA charge. To my absolute horror and disappointment Dato Gani
E Patail used the meeting and the death sentence under s 57 of the ISA as a bargaining tool to gather evidence against Dato' Seri Anwar Ibrahim. He had with him the letter I had written to you and copied to him. He was waving the letter about and kept on saying, repeatedly, 'I am not impressed' and suggesting that he would not be impressed with any plea to a charge under the Arms Act but instead wanted more. This 'more', and it came across very loud and clear because Dato Gani laid it out in very clear and definite terms, was:
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(1) that Nallakaruppan was now facing the death sentence.

(2) that there were other charges also under the ISA that he could prefer against Nallakarrupan but if they (A-G's Chambers?) hanged him once under the present charge, what need would there be to charge him for anything else.

G (3) that in exchange for a reduction of the present charge to one under the Arms Act, he wanted Nallakaruppan to co-operate with them and to give information against Anwar Ibrahim, specially on matters concerning several married women. Dato Gani kept changing the number of women and finally settled on five, three married and two unmarried.

H (4) that he would expect Nallakaruppan to testify against Anwar in respect of these women.

I was shocked that Dato Gani even had the gall to make such a suggestion to me. He obviously does not know me. I do not approve of such extraction of evidence against ANYONE, not even, or should I say least of all, a beggar picked up off the streets. A man's life, or for that matter even his freedom, is
I not a tool for prosecution agencies to use as a bargaining chip. No jurisprudential system will condone such an act. It is blackmail and extortion of the highest culpability and my greatest disappointment is that a once

independent agency that I worked with some 25 years ago and of which I have such satisfying memories has descended to such levels in the creation and collection of evidence. To use the death threat as a means to the extortion of evidence that is otherwise not there (why else make such a demand?) is unforgivable and surely must in itself be a crime, leave alone a sin, of the greatest magnitude. Whether his means justify the end that he seeks are matters that Dato Gani will have to wrestle with within his own conscience.

I have agonized over this machinations of Dato Gani's for the last 10 days. I have known you for close to 26 years. I cannot imagine you condoning such an act. And so this third and final letter on this matter and my decision to let you know what transpired on the afternoon of 2 October 1998. How far into your chambers the corruption has spread I cannot say but that you will have to stop it goes without saying.

Nallakaruppan does not deserve the charge under the ISA bearing in mind what I have set out above and what is tabulated below. The facts relating to the 125 bullets have been set out in my earlier two letters. In my second letter I mentioned the Samsuri Welch Abdullah charges. I have since researched into the Arms Act prosecutions by your department over the last few years but because of the constraint of time have only been able to go back till 1993, a period well within your tenure as Attorney General. I have chronologically listed out below all the cases reported in the local papers that I have been able to locate. All that is important at this juncture is to note that even in matters of far greater magnitude, you have chosen the Arms Act as the vehicle for your prosecutions.

When the motion was called up for hearing before me on 30 November 1998, I explained to the parties why I had to take immediate action in the following terms:

I am surprised that this notice has been filed, as in many meetings that I had with counsel in chambers, they have expressed satisfaction with the conduct of the proceedings and that the prosecution is fair including a statement that we have a very fair Attorney General. I had intended to adjourn the hearing of this application to a later date. But the blaze of publicity that has been given to it warrants immediate action.

Soon after the motion was called up, I intimated to the parties that I intend to commence proceedings for contempt of court against En Zainur Zakaria ('ZZ') for having filed it. In order to ascertain whether ZZ had filed the motion without giving it much thought, I asked him a series of questions so that I may be in a better position to re-evaluate its contents. I informed him that as the motion had been filed by him, he had to assume full responsibility for it. When I asked him whether the basis of his application were the SD and the letter, he answered in the affirmative. I then told him this:

I believe you are aware of the law relating to accomplice evidence and the right of the Public Prosecutor to reduce a charge or not to charge a person if he co-operates and provides information to the police.

He answered it this way:

I am not obliged to answer that question.

A This answer made it necessary for me to explain to him that it is within the power of the Public Prosecutor not to charge a person or to prefer a reduced charge against him if he co-operates with the police by providing information to secure the conviction of his partners in crime. In support of this, I read to him a passage from *Law of Evidence* by Woodroffe and Amir Ali (16th Ed) at p 3464:

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> The police, of course, will never solicit a party to become an approver unless they have failed in every other mode. When, however, they consider it necessary to resort to this measure and have obtained the necessary authority, they will, of course, be at liberty to address themselves directly to such of the prisoners, as they think most proper, and to urge them, by every argument and by the fullest promises of pardon, to make a free disclosure. A good deal of fact, however, will be necessary in selecting the prisoners whom it is desired to admit as approvers, it will not do to embarrass the course of justice by pardoning more criminals than can be helped. On the other hand, it is necessary to choose one who is thoroughly acquainted with every circumstance and every accomplice, and who is at the same time willing to tell the entire truth. Where the crime is an isolated transaction, it will be best, for instance, in a gang robbery attended with murder, to select one who was led into the crime, or who took a minor part, rather than one of the ringleaders and actual murderers. Such a person will have less to conceal, which tells against himself, and will, therefore, be more truthful. He is also likely to be less intimately connected with the other accomplices, and therefore more ready to inform against them. On the other hand, where the crime is a matter of wide organization; as for instance, an extensive system of gang robbery, it will be advisable to select an old offender, as his information, if true, will be much more valuable. It should then be definitely explained to him that his pardon is only conditional, and that the condition is, that he should make a full and true disclosure of everything he knows, and of every person connected with the matter.

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F And from *The Law of Evidence* by ERSR Coomarasuramy Vol II at p 361:

> The accomplice gives his evidence under the promise of a pardon, or in the expectation of an implied pardon, if he discloses all he knows against those with whom he acted criminally and this hope would lead him to favour the prosecution ... Wigmore says: 'He may expect to save himself from punishment by procuring the conviction of others. It is true that he is also charging himself, and in that respect, he has burned his ship. But he can escape the consequences of this acknowledgment, if the prosecuting authorities choose to release him, provided he helps them to secure the conviction of his partners in crime.

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H And from *Sarkar on Evidence* (14th Ed) at p 1905:

> Accomplice evidence is admitted from necessity as it is generally impossible to get sufficient evidence of many heinous and diabolical crimes, unless one of the participators is disposed to disclose the circumstances within his knowledge on account of the tender of pardon.

I Having explained the law, I asked him to read paras 13, 16 and 18 of the affidavit which he did. I asked him whether the allegations made in these paragraphs can be supported by the contents of the SD and the letter. In

answering in the affirmative, he said that they are based on a reading of the SD and the letter as a whole. I then asked ZZ:

> Do you agree that para 4 is Mr Manjeet's conclusion and has nothing to do with his meeting with Gani Patail?

In answer to that, he said:

> From what I understand from para 4, it was the conclusion based on the meeting between Mr Manjeet and Gani Patail. I agree that para 4 is Mr Manjeet's own conclusion.

When I referred ZZ to para 3 of the letter and asked him to identify the relevant part of the paragraph which suggests that there was a request to fabricate evidence, he said:

> Paragraph 3 must be read with para 4. In para 3, it is point 3. (He reads): That in exchange for a reduction of the present charge to one under the Arms Act, he wanted Nallakaruppan to co-operate with them and to give information against Anwar Ibrahim specifically on matters concerning several married women. Dato Gani kept changing the number of women and finally settled on five, three married and two unmarried. Point No (4): That he would expect Nallakaruppan to testify against Anwar in respect of these women.

I then asked him whether item 3 in para 3 of the letter has the effect of suggesting that there was a request to fabricate evidence. He said that it must be read with para 4. To further questions from me, he said that the word 'creation' of evidence in para 4 shows that Nallakaruppan was asked to create evidence. He concluded by saying that the SD and the letter suggest that there was a request to fabricate evidence. I was not satisfied with the answers given by ZZ and proceeded to cite him for contempt for reasons which I shall explain in a later part of the judgment.

I told ZZ that I propose to cite him for contempt for having attempted to undermine the integrity of this trial. I adjourned court for 30 minutes to enable him to consider whether he would tender an unconditional apology to this court, the Honourable Attorney General, AGP and En Azahar Mohamed so that I could exercise my powers of mercy by dropping all further proceedings. When the court resumed, he said that he is unable to apologize. In the light of the stand taken by him, I had no option but to ask him to show cause why he should not be punished for contempt of court in the following terms:

> Encik Zainur Zakaria, I call upon you to show cause why you should not be punished for contempt of court for filing a notice of motion with a supporting affidavit which contains scandalous and contemptuous matters, in particular, in paras 13, 16 and 18.

He then requested for an adjournment in order to adduce evidence to show that the meeting referred to by MSD did in fact take place. I refused this application for reasons which I shall consider in a later part of the judgment. ZZ then showed cause by saying that he filed the motion upon instructions of his client.

A In his submission, Raja Aziz Addruse, leading counsel for ZZ, said that matters of this nature are discussed by all counsel. He was consulted in this matter and had settled the affidavit. He then asked whether I found it unnecessary to call MSD and others to explain the views held by the court. I said that it was unnecessary as all documents were before me. As I was not satisfied with the explanation offered by ZZ, I found him guilty. I then asked B him whether he wished to tender an apology on the terms that I had described earlier. He declined to do so. Having considered his plea in mitigation, I convicted him and sentenced him to three months imprisonment. I rejected his application for a stay of execution pending appeal. This appeal is by ZZ against the conviction and sentence.

C I consider it necessary to set out my grounds of judgment under the following headings:

(a) the law;

(b) the contempt in this case;

D (c) whether it was urgent and imperative to invoke the summary procedure on the facts of this case;

(d) the explanation offered by the contemnor;

(e) the application to call witnesses; and

(f) the sentence.

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The law

The purpose of contempt proceedings was summarized by Lord Morris in *Attorney General v Times Newspapers Ltd* [1974] AC 273 where his Lordship said at p 302:

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> In an ordered community, courts are established for the pacific settlement of disputes and for the maintenance of law and order. In the general interests of the community, it is imperative that the authority of the courts should not be imperilled and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed, it is not because those charged with the responsibilities of administering justice are G concerned for their own dignity, it is because the very structure of ordered life is at risk if the recognized courts of the land are so flouted that their authority wanes and is supplanted.

As to the acts that constitute contempt of court, useful reference may be made to *R v Gray* [1900] 2 QB 36 where Lord Russell said at p 40:

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> Any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority, is a contempt of court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts is a contempt of court. The former class belongs to the category which Lord Hardwicke CJ characterized as 'scandalizing a court or a judge'. I The description of that class of contempt is to be taken subject to one and an important qualification. Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as

> contrary to law or the public good, no court could or would treat that as contempt of court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter, the liberty of the press is no greater and no less than the liberty of every subject of the Queen. Now, as I have said, no one has suggested that this is not a contempt of court, and nobody has suggested or could suggest, that it falls within the right of public criticism in the sense I have described. It is not criticism: I repeat that it is a personal scurrilous abuse of a judge as a judge.

As Lord Russell pointed out in that case, the same principles apply to newspaper publications and to acts other than press publications (see *R v Collins* [1954] VLR 46).

A matter of considerable importance is whether mens rea is required in cases of this nature. In *R v Odham's Press Ltd Ors; ex p Attorney General* [1956] 3 All ER 494; [1957] 1 QB 73, Lord Goddard CJ considered the question of mens rea in publications that affect the administration of justice and said at p 497:

> These cases clearly show that lack of intention or knowledge is no excuse, though it may have a great bearing on the punishment which the court will inflict and in our opinion they dispose of the argument that mens rea must be present to constitute a contempt of which the court will take cognizance and punish. The test is whether the matter complained of is calculated to interfere with the course of justice, not whether the authors and printers intended that result, just as it is no defence for the person responsible for the publication of a libel to plead that he did not know the matter was defamatory and had no intention to defame.

(See also *R v Griffiths & Ors; ex p Attorney General* [1957] 2 All ER 379). The case of *R v Odham's Press Ltd & Ors; ex p Attorney General* [1956] 3 All ER 494 was considered by the Court of Appeal in *Attorney General v Butterworth* [1963] 1 QB 696 where Lord Denning MR said at p 722:

> Much of the argument to the contrary was based on *Reg v Odham's Press Ltd* which established, it was said, that the test of criminal contempt was objective and not subjective. I do not like those obscurantist expressions 'objective' and 'subjective'. But as the argument developed, it seemed to go something like this: In considering whether a man has been guilty of contempt of court, you do not look at his knowledge or intention, but only at what he did. If his action was calculated to interfere with the course of justice, that is enough, irrespective of his state of mind at that time.

Donovan LJ said in the same case at p 726:

> *Reg v Odham's Press Ltd* makes it clear that an intention to interfere with the proper administration of justice is not an essential ingredient of the offence of contempt of court. It is enough if the action complained of is inherently likely so to interfere. A newspaper article accusing a man of crime after proceedings have been begun and before his trial plainly answers that description.

In *R v Murphy* [1969] 4 DLR (3d) 289, Bridges CJNB said that the same principles undoubtedly apply to the question of intent with regard to both the classes of contempt as stated in *R v Gray*. Therefore, an intent to

A interfere with the due administration of justice, or a realization that one is running this risk, is not essential (see *R v Dolan* [1907] 2 IR 260; *R v Odham's Press Ltd*). It is irrelevant that a contemnor believed that the course that he took was proper in all the circumstances (see *Cheah Cheng Hoc v PP* [1986] 1 MLJ 299). It must be noted that the question whether the intent to bring pressure succeeded or not is not material (see *Attorney General v* B *Hislop & Anor* [1991] 1 All ER 911). In *R v Odham's Press Ltd*, Lord Goddard CJ said that the court is not concerned with the truth or falsity of the various allegations in the article (see also the *Skipworth's and the Defendant's case* (1873) LR 9 QB 230; *Attorney General v Hislop & Anor*). The fact that the allegations made are relevant to the case is immaterial (see C *R v Collins*). In *Evening Standard Co Ltd; ex p Attorney General* [1954] 1 All ER 1026, it was held that though the prejudicial matter published was an honest mistake and the editor had no reason to suppose that the report was inaccurate, a contempt was still held to have been committed. In *R v Thomson Newspapers Ltd & Ors; ex p Attorney General* [1968] 1 All ER 268, it was held that if a matter is published intentionally with the very object of D prejudicing a fair trial, the contempt becomes more serious.

Thus, the question to be determined is not the effect the writer intended his article to have but the effect the article itself is calculated to have. The phrase 'calculated to prejudice' does not mean that a publication is actually prejudicial to a trial. It refers to a publication which, when objectively viewed, can reasonably be said to present a risk of prejudice. As E Isaacs and Rich JJ said in *Bell v Stewart* (1920) 28 CLR 419 at p 432:

> The tendency of an article, therefore, means that the nature of it — as distinct from its actual or even probable force in the specific circumstances — is such that prejudice might result.

F As Lord Diplock said in *Attorney General v Times Newspapers Ltd* at p 309:

> Whether in the result, the publication will have had any influence upon jurors or witnesses is not known when the proceedings for committal for contempt of court are heard. The mischief against which the summary remedy for contempt of court is directed is not merely that justice will not be done but that it will not be manifestly seen to be done. Contempt of court is punishable G because it undermines the confidence not only of the parties to the particular litigation but also of the public as potential suitors in the due administration of justice by the established courts of law.

Contempt in the face of the court involves some form of misconduct in the course of proceedings, either within the court itself or, at least, directly H connected with what is happening in court (see *Dean's Case* (1598) Cro Eliz 689). This is an immediate remedy necessary for the purpose of ensuring that a trial in progress or about to start can be brought to a proper and dignified end without disturbance and with a fair chance of a just verdict or judgment (see *Balogh v St Alban's Crown Court* [1974] 3 All ER 283). In *Attorney General v Times Newspapers Ltd*, Lord Diplock said that to I constitute a contempt of court that attracts the summary remedy, the conduct complained of must relate to some specific case in which litigation in a court of law is actually proceeding or known to be imminent. In that

case, his Lordship outlined the various ways in which the due administration of justice might be prejudiced in the following terms:

> The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these requirements or to undermine the public confidence that they will be observed is a contempt of court.

In the *Skipworth's and the Defendant's Case*, Blackburn J said at p 233:

> When an action is pending in the court and anything is done which has a tendency to obstruct the ordinary course of justice or to prejudice the trial, there is a power given to the courts, by the exercise of a summary jurisdiction, to deal with and prevent any such matter which should interfere with the due course of justice; and that power has been exercised, I believe, from the earliest times that the law has existed.

Lord Tucker said in *Izuora (Joseph Orakwue) v R* [1953] AC 327 that it is not possible to particularize the acts which can or cannot constitute contempt in the face of the court. In *Cheah Cheng Hoc v PP*, the contempt committed in the face of the court by the solicitor was his alleged breach of duty as counsel in a civil case, the allegations being that the appellant concealed a document so as to affect the credibility of a witness in a civil suit. In *PP v Seeralan* [1985] 2 MLJ 30, the contempt committed in the face of the court was that the counsel for the accused in that case accused the Bench, inter alia, of being unfair and biased against a witness. In the *Skipworth's and the Defendant's Case*, the defendant who attempted to prevent the Lord Chief Justice from hearing a case in a speech that he gave in a meeting was dealt with by summary process. Interference with persons having duties to discharge in a court of justice is a contempt. This was explained by Bowen LJ in *Re Johnson* (1887) 20 QBD 68 at p 74 in the following way:

> The law has armed the High Court of Justice with the power and imposed on it the duty of preventing *brevi manu* and by summary proceedings any attempt to interfere with the administration of justice. It is on that ground, and not on any exaggerated notions of the dignity of individuals that insults to judges are not allowed. The principle is that those who have duties to discharge in a court of justice are protected by the law, and shielded on their way to the discharge of such duties, while discharging them, and on their return therefrom, in order that such persons may safely have resort to courts of justice.

Abuse of the court's process can also amount to contempt. In this regard, I refer to7 *Halsbury's Laws of England* (2nd Ed) para 28:

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> Abusing the process of the court is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive, the ordinary remedy in such a case being to apply to strike out a pleading or stay the proceedings, or to prevent further proceedings being taken without leave. Beyond this, the court has jurisdiction to punish abuse of process by committal or attachment as a contempt.

B As *The Law of Contempt* (3rd Ed) by Borrie and Lowe says at p 457:

> The most serious example of abuse of process is conduct which is intended to deceive the court, for example, by the deliberate suppression of facts or by the presentation of falsehood, but the term also includes the bringing of frivolous or vexatious proceedings.

C And at p 461:

> Misusing the court's process, at least where other parties are thereby prejudiced, may also amount to a punishable contempt.

It must not be thought that the courts will not use their contempt jurisdiction where there is abuse of process. As Lord Merrivale P said in *Apted v Apted and Bliss* [1930] P 246 at pp 262–263:

> There is a general assumption that the sole penalty for suppression of fact or presentment of falsehood in cases such as this [ie a divorce suit] is the allowance of the King's Proctor's intervention, rescission of the decree nisi and the dismissal of the suit, with an order for the payment of costs — an order not infrequently found incapable of enforcement. This is not an adequate view of the matter. One of the safeguards of legal procedure in this country is the prescriptive authority of courts of record to visit with summary punishment persons who purposely obstruct or divert the course of justice.

In *Linwood v Andrews and Moore* (1888) 58 LT 612, a barrister was held guilty of contempt by being party to the reading to the court of a false affidavit and was imprisoned. In *R v Weisz; ex p Hector & Anor* [1951] 2 All ER 408, it was held to be a contempt for a solicitor to disguise the true nature of an action by means of a fictitious indorsement. In that case, the solicitor was instructed by a client to bring an action to recover a gambling debt, which is not enforceable in a court of law. The indorsement stated that the debts were due on account stated, this being a device to disguise the true nature of the action, since there had been no account stated. As Lord Goddard CJ said at p 412:

> It is, in our opinion, beyond question that to disguise a cause of action so as to conceal its true nature, when, in truth, it is one prohibited by statute is a contempt ... .

In *Balogh v St Alban's Crown Court*, Stephenson LJ said that summary contempt procedure appears to be 'rough justice'. In that case, Lawton LJ said at p 294:

> ... there is no jury. *The judge, who may himself have been insulted or even assaulted, passes sentence.* Some aspects of proceedings for contempt of court, in *Blackstone*'s phrase (Commentaries, 16th Ed) 1825 bk 4 Ch 20 p 287) are 'not agreeable to the genius of the common law'. Yet judges have this unusual jurisdiction. (Emphasis added).

Anthony Arlidge and David Eady in their book entitled *The Law of Contempt* (1982) said at p 47 that when this special procedure is used, many of the rules and statutory provisions ordinarily applicable to trials on indictment do not apply. In the trilogy of Malaysian cases of *Karam Singh v PP* [1975] 1 MLJ 229, *Re Kumaraendran* [1975] 2 MLJ 45, and *Jaginder Singh & Ors v Attorney General* [1983] 1 MLJ 71, it was decidedly declared that some of the rules of natural justice have no application in summary contempt jurisdiction. Raja Azlan Shah Ag LP (as His Highness then was) in writing for the Federal Court in *Jaginder Singh & Ors v Attorney General* said that summary contempt procedure requires that the judge should not only be both prosecutor and adjudicator, but should also have been witness to the matters to be adjudicated upon. Thus, it is clear that a contempt proceeding is far removed from the procedures as in a normal trial that we are all so used to. It requires no complaint, there is no charge, there is no trial in the strict sense of the word, the rights of a person proceeded against are restricted, it is arbitrary, the court may be judge and party at the same time and it is contrary to some of the rules of natural justice. In this regard, useful reference may be made to *R v Griffin* (1988) 88 Cr App R 63 where Mustill LJ said:

> We are here concerned with the exercise of a jurisdiction which is sui generis so far as the English law is concerned. In proceedings for criminal contempt, there is no prosecutor, or even a requirement that a representative of the Crown or of the injured party should institute the proceedings. The judge is entitled to proceed of his own motion. There is no summons or indictment, nor is it mandatory for any written account of the accusation made against him to be furnished to the contemnor. There is no preliminary inquiry or filtering procedure, such as a committal. Depositions are not taken. There is no jury. Nor is the system adversarial in character. The judge himself enquires into the circumstances so far as they are not within his personal knowledge. He identifies the grounds of complaint, selects the witnesses and investigates what they have to say (subject to a right of cross-examination), decides on guilt and pronounces sentence. This summary procedure, which by its nature is to be used quickly if it is to be used at all, omits many of the safeguards to which an accused is ordinarily entitled, and for this reason it has been repeatedly stated that the judge should choose to adopt it only in cases of real need.

Notwithstanding its pecularities, it is a necessary power. As Lord Denning MR said in *Morris v Crown Office* [1970] 2 QB 114 at p 122:

> It is a great power — a power to instantly imprison a person without trial — but it is a necessary power.

As *Archibold: Criminal Pleading, Evidence and Practice* (1997) says at p 2368:

> The power of summary punishment is a necessary power. It is given so as to maintain the dignity and authority of the judge and to ensure a fair trial.

In *Cheah Cheng Hoc v PP*, Lee Hun Hoe CJ (Borneo) in delivering the judgment of the (then) Supreme Court said that the power of summary punishment is a necessary power to maintain the dignity and authority of the judge and to ensure a fair trial. Therefore, the court has been authorized by Parliament to take cognizance of and proceed with an offence summarily

in this manner (see *PP v Seeralan*). In that case, the contemnor raised the objection that the magistrate who took cognizance of the contempt being himself, the complainant, was biased. The magistrate proceeded with the case and it was upheld by the Federal Court. However, the contemnor is given an opportunity to show cause. He is not condemned unheard.

The contempt in this case

The allegations made against AGP and En Azahar bin Mohamed, senior deputy public prosecutors, arise from a meeting that MSD and one Mr Balwant Singh, advocate and solicitor, had with AGP at the Attorney General's Chambers on 2 October 1998. Paragraph 3 of the letter contains an account of what transpired at the meeting. I pause to add that the letter, being self-explanatory as stated by MSD in para 3 of the SD, must be taken to be comprehensive. MSD said in the letter that at the meeting AGP made suggestions that ' ... he would not be impressed with any plea to a charge under the Arms Act but instead wanted more'. The ' ... more ... ' that AGP wanted was:

(1) that Nallakaruppan was now facing the death sentence.

(2) that there were other charges also under the ISA that he could prefer against Nallakaruppan but if they (A-G's Chambers) hanged him once under the present charge, what need would there be to charge him for anything else.

(3) that in exchange for a reduction of the present charge to one under the Arms Act, he wanted Nallakaruppan to co-operate with them and to give information against Anwar Ibrahim, specially on matters concerning several married women. Dato' Gani kept changing the number of women and finally settled on five, three married and two unmarried.

(4) that he would expect Nallakaruppan to testify against Anwar in respect of these women.

Items 1 and 2 as enumerated above are not significant. The salient parts of items 3 and 4 are that AGP wanted Nallakaruppan to co-operate with them and give information against the accused and also testify against him in exchange for a reduction of the charge. The critical issue for determination is whether this conduct on the part of AGP amounts to a request to fabricate evidence against the accused. MSD had stated in para 4 of the letter that '... To use the death threat as a means to the extortion of evidence that is otherwise not there (why else make such a demand?) is unforgivable ...'. I shall now consider whether this view is justified. Firstly, MSD was in no position to come to such a conclusion in the absence of knowledge of the nature of evidence that is contained in the investigation papers in the hands of the prosecution. The use of the words by him ' ... (why else make such a demand?) ... ' clearly show that his views were based on the assumption that the prosecution did not have any evidence at all and, as a result, he was asked for evidence ' ... that is otherwise not there'. Secondly, the conclusion of MSD as contained in para 4 of the letter may be justifiable only if it was arrived at after he had discussed the matter with his client in order to ascertain what the latter knew. The letter is dated 12 October 1998.

However, para 8 of the SD states that MSD met his client on 13 October 1998 to convey AGP's demands to him. This shows that MSD came to his conclusion even before he had discussed the matter with his client to find out what the latter knew. I find support for this in para 8 of the SD where MSD had said that there was nothing that his client could have done ' ... short of lying'. This clearly indicates that up to the 13th, MSD did not know what his client knew. It cannot be assumed that MSD was aware of what his client knew at that point of time as otherwise there would have been no need for him to refer the matter to his client which he did. For MSD, therefore, to refer to ' ... the extortion of evidence that is otherwise not there ... ' is ill-advised. As I have pointed out in an earlier part of the judgment, it is perfectly legitimate for the Public Prosecutor to ask a person to provide information against another person in exchange for a reduction in a charge against him or even a pardon. This is practised in every civilized system of criminal administration of justice and public interest necessitates it as otherwise it would be virtually impossible for the authorities to proceed against many criminals. In my opinion, there is no indication, explicit or subtle, direct or indirect, in the request for information against the accused by AGP for the giving of any false information. It was an exercise of lawful powers with no undertones of any impropriety. The conversation that transpired at the meeting as described in para 3 of the letter ought to have made this plain and patent even to the most uninitiated. It follows that the reading of anything else into para 3 of the letter is an act of bad faith calculated to undermine the administration of justice. Be that as it may, ZZ was in a totally different position with regard to the facts in the possession of the prosecution at the material time than MSD was. At the time he filed the motion, the prosecution had already tendered in evidence exh ID14B of which ZZ, being a senior member of the defence team, must be aware. The material parts of exh ID14B read as follows:

BAB MODUS OPERANDI ANWAR-SHAMSIDAR-DATO' NALA

Pada kebiasaannya, si-pemandu Azizan akan menurunkan Shamsidar pada setiap kali pertemuan di Café Guana di Bangsar Shopping Complex dan kereta mewah Daimler WBV 37 yang dikatakan kepunyaan Dato' Nala (Eksekutif Director Magnum Corp) akan datang bersama beliau untuk menjemputnya di Bangsar Shopping Complex dan seterusnya mereka akan menuju ke kondominium mewah di Tivoli Villa untuk tempoh dua-tiga jam. Waktunya ialah 5.30 petang dan pada kebiasaannya ialah pada hari Rabu.

Alasan yang sering diberikan oleh Anwar kepada polis pengiring bahawa beliau ingin bermain tennis dengan Nala di Bukit Kiara. Polis pengiring dilarang turut serta. Begitulah kejadian keji yang berlaku sekian lama untuk tempoh beberapa tahun tanpa pengetahuan Azmin.

Selalunya, perbuatan mereka adalah dua-minggu atau sebulan sekali.

BAB KEJADIAN 30 JUN 1997 5.35 PETANG (ISNIN)

Saya menerima panggilan telefon pada pukul 5 petang dari Azizan bahawa satu pertemuan antara mereka, yakni Anwar-Shamsidar di Bangsar Shopping Complex.

A Ketika itu, saya berada di Setapak dan dengan penuh rasa tanggungjawab bagi memastikan pengaduan Azizan adalah benar dan sahih, maka saya berkejar ke tempat kejadian iaitu di Bangsar Shopping Complex.

Dalam perjalanan, saya sempat menelefon abang sulung, Mohd Azman Ali untuk turut serta.

B Bersama saya ialah rakan karib saya Puan Zamrah Lajis. Saya juga sempat menelefon seorang lagi rakan bernama Puan Normala untuk meminjam pelekat kereta Kondominium Trivoli Villa bagi tujuan masuk ke dalam kondominium.

Dengan izin Allah, kami tiba tepat pada masanya di mana kereta Daimler WBV 37 sedang menanti. Mereka tidak perasan kehadiran kami.

C Akhirnya, Allah telah menunjukkan di depan mata kami Puan Shamsidar menaiki kereta tersebut menyusur ke Kondo Trivoli Villa Bangsar.

Kami mengekorinya dari belakang tanpa pengetahuan mereka.

Lima saksi pada kejadian tersebut ialah Ummi Hafilda Ali, Mohd Azman Ali, Puan Zamrah Lajis, Puan Normala dan Azizan Abu Bakar.

D Mereka keluar dari Kondo Trivoli Villa pada pukul 7.40 malam dan kereta Daimler menghantar semula Shamsidar ke Bangsar Shopping Complex di mana Azizan menanti di tempat yang sama.

Kami tidak keberatan memberikan laporan terperinci sekiranya diberikan peluang untuk bertemu secara peribadi dengan YAB yang cukup kami sanjungi.

E Saya hampir-hampir gila bila mengenangkan seorang tokoh pemimpin yang begitu saya sanjungi lebih-lebih lagi ketokohan beliau di bidang agama sanggup melakukan perbuatan yang amat keji dan hina sebagai pemimpin negara.

Mujurlah, abang saya Mohd Azman menenangkan keadaan di mana beliau mengatakan terlalu bahaya untuk kami mengambil tindakan apatah lagi F ketika itu bapa kepimpinan yang amat kami sanjungi iaitu Dato' Seri Dr Mahathir tiada di dalam negara.

Seluruh keluarga terperanjat, sedih, tertekan dan terhina oleh perbuatan keji insan munafik Anwar Ibrahim. Tetapi apakan daya, kami tiada kuasa kecuali meminta pandangan dari rakan-rakan yang saya percaya seperti Puan Sri Saadah dan Puan Norziela Jalil yang akhirnya memberikan saya satu G semangat bagi membongkar pembohongan dan kemungkaran terbesar di mukabumi ini.

YAB, kami tidak melaporkan kepada Mohamed Azmin kerana percaya bahawa kasih-sayang dan kesetiaaannya terhadap isteri dan ketua tidak berbelah bagi. Kami juga khuatir beliau mungkin mengambil tindakan di luar jangkaan sekiranya berasa amat tertekan.

H The pertinent parts of exh ID14B that I have reproduced reveal the involvement of Dato Nallakaruppan in the alleged relationship between the accused and Shamsidar. As this exhibit was in the possession of the prosecution when MSD met AGP, AGP was clearly not asking for ' ... evidence that is otherwise not there ... '. As ZZ was aware or ought to have I been aware, of the contents of exh ID14B, his acceptance of the conclusion of MSD as appearing in para 4 of the letter is sheer recklessness and negligence at its height. ZZ has in fact expanded on the mildly worded

conclusion of MSD to found an allegation which is completely baseless and unsupported by the evidence available to him. As a matter of fact, the contents of exh ID14B ought to have put ZZ on guard when he read the letter. I would have expected him, as a senior member of the Bar and an officer of the court, to have alerted MSD on the folly of the conclusion drawn by the latter in the light of information available to him. That may have afforded an opportunity for MSD to retract from the stand that he had taken.

It is my view that para 3 of the letter does not support the view that there was a request to falsely implicate the accused and to fabricate evidence against him as contained in paras 13 and 16 of the affidavit. To further state in para 18 of the affidavit that the involvement of the senior deputy public prosecutors ' ... has already raised grave doubts as to the integrity of the evidence ... ' adduced by the prosecution in this case is an attempt to undermine the integrity of this trial. Any conclusion formed by the accused and his counsel must be based on para 3 of the letter and not on the views expressed by MSD. ZZ had in fact agreed to a question by me that para 4 of the letter is MSD's own conclusion. He ought to have applied his mind to ascertain whether the conclusion formed by MSD was reasonable bearing in mind what had transpired at the meeting as described in para 3 of the letter against the background of his knowledge of exh ID14B. As ZZ had access to ID14B, and was thereby in a better position than MSD, he ought to have realized that based on its contents, the conclusion of MSD in para 4 of the letter is without basis. I pause to add that the alleged request by the prosecution to fabricate evidence, in view of the fact that the defence in this case is anchored on fabricated evidence, ought to have caused a police report to have been lodged immediately as this, if found to be true, would give immense credibility to the defence persistently advocated and advanced. Yet no police report had been lodged on the alleged request to fabricate evidence. I was therefore of the view that the filing of the motion by ZZ amounted to a contempt of court.

An advocate and solicitor is always responsible to the court for the character of the pleadings (see *Hamilton v Anderson* (1858) 3 Macq 363 (HL)). The court has power to punish as contempt any misuse of its powers (see *Cheah Cheng Hoc v PP*). It has been held that for an act done in the face of the court, or in the course of proceedings, to be a contempt, it must be such as would interfere, or tend to interfere, with the course of justice (see *Parashuram Detaram Shamdasani v King-Emperor* [1945] AC 264). It can arise from an affidavit filed in support of an application (see *Attorney General, Malaysia v Manjeet Singh Dhillon* [1991] 1 MLJ 167). In *R v Gregory* (1843) 1 Cox CC 31, it was held that the filing of an affidavit containing defamatory and irrelevant matter amounts to a contempt of court. It is irrelevant that the affidavit was not actually read in court. The fact that it was filed and thereby put in the court file is sufficient publication to constitute contempt (see *R v Collins*). It is not a defence to a charge of contempt of court that the affidavit relied on as contemptuous is relevant to the proceedings in which it is made, if such affidavit goes beyond what any litigant could honestly and reasonably think to be no more than necessary

A or proper to establish a defence to the proceedings, or could honestly and reasonably consider to form the basis of a serious and genuine argument in the proceedings (see *R v Collins*). An advocate and solicitor must satisfy himself as to the accuracy of an affidavit which his client swears and he does not discharge his duty in such a case by requesting the client to make a proper affidavit and then filing whatever affidavit the client thinks fit to B swear to (see *Myers v Elman* [1939] 4 All ER 484). Thus, it is his duty to inform himself correctly of the nature of his client's demand, and of the proof which can be adduced in its support (see *Gill v Lougher* (1830) 148 ER 1379).

The allegations against the two senior deputy public prosecutors C interfere with the due administration of justice as they are of such a nature as to affect the dignity and authority of the court's proceedings (see *R v Collins*). This becomes particularly significant in this case in the light of the immense public interest that it has generated. An allegation that the involvement of the two senior deputy public prosecutors in this case has raised grave doubts as to the integrity of the evidence adduced will seriously D affect public confidence in this trial. The motion interferes with the course of justice or has a tendency to do so. I was therefore of the view that the filing of the motion by ZZ was scandalous, frivolous, vexatious and an abuse of the process of the court with the objective of undermining the integrity of this trial. It had the tendency to deflect the court from a strict and E unhesitating application of the letter of the law and from determining the issues exclusively by reference to the evidence. It must be observed that the allegations against the senior deputy public prosecutors amount to contempt of court on exactly the same principles applicable with regard to criticism of a judge (see *In the Matter of Phola Nath Chaudhary, Contemnor* AIR 1961 Pat 1). Thus, the filing of the motion with the supporting affidavit F by ZZ amounted to a contempt in the face of the court. It required immediate action.

In considering whether the motion filed by Messrs Zainur Zakaria and Co was contemptuous, I accepted the description as to what transpired between AGP and MSD at the meeting as stated in the documents annexed to the motion. I must point out that the foundation of the motion was the G meeting between the two persons. It was therefore unnecessary for me to look for any further evidence including the calling of witnesses. Thus, there was no need for me to await an affidavit-in-reply from the Attorney General's Chambers as all the facts were before me.

H *Whether it was urgent and imperative to invoke the summary procedure on the facts of this case*

The course of action adopted by me was necessary to ensure that the trial in progress is brought to a proper and dignified end without disturbance (see *Balogh v St Alban's Crown Court*). A baseless allegation as that I contained in para 18 of the affidavit that grave doubts have been raised as to the integrity of the evidence adduced in this trial will lower the confidence of the public in the evidence adduced in this case unless immediate steps are

taken to arrest it. The allegations against the two senior deputy public prosecutors as contained in paras 13 and 16 of the affidavit will further aggravate the matter. As Lord Hardwicke LC said in *Re Read and Huggonson* (1742) 26 ER 683, there cannot be anything of greater consequence than to keep the streams of justice clean and pure so that parties may proceed with safety both to themselves and to their characters. In *Attorney General v Butterworth*, Donovan LJ said that the administration of justice is, after all, a continuing thing. It is not bounded by the day's cases. It has a future as well as a present. And if somebody pollutes the stream today, tomorrow's litigant will find it poisoned. In the premises, swift and immediate action was necessary to protect the interests of the public by ensuring that the integrity of the trial in progress is maintained (see *Jaginder Singh & Ors v Attorney General*). This assumes monumental significance in this case in view of its extensive publicity both at national and international level.

A B C

However, I must stress that before taking cognizance of the contempt, I gave anxious and careful consideration with great circumspection to the problem at hand. I was aware of what Raja Azlan Shah Ag LP (as His Highness then was) said in *Jaginder Singh & Ors v Attorney General* that since a finding of a contempt of court is a conviction for an offence, the jurisdiction must be exercised sparingly and where it is absolutely necessary. In *Cheah Cheng Hoc v PP*, Lee Hun Hoe CJ (Borneo) said that summary contempt jurisdiction should be exercised with scrupulous care and sparingly but fearlessly when necessary to prevent obstruction of justice. I weighed the other alternatives available so as to avoid, if possible, proceeding in this manner. A proceeding by way of a motion for committal was out of the question as I was firmly of the view that immediate action was needed in order to prevent the integrity of the trial being infected. I also considered the possibility of referring the conduct of ZZ to the Bar Council for action bearing in mind the advice offered by Raja Azlan FJ (as High Highness then was) in *Karam Singh*. However, I was of the view that the facts of this case disclosed a far more serious contempt and was no comparison to the facts of that case. In the premises, I found it necessary to proceed, as I did, summarily.

D E F G

The explanation offered by the contemnor

The explanation offered by ZZ is in the following terms:

> The application was filed upon instructions by my client Dato' Seri Anwar Ibrahim. And I did so in the discharge of my professional duty. The obligation of an advocate and solicitor is not only found in common law but in our case is also, if I may say, enshrined in our Legal Profession Act, if I am not mistaken s 42 requires an advocate and solicitor to uphold justice without fear or favour. That was my objective in filing the application.

H

The defence of ZZ is that he filed the motion upon instructions from his client and that he did so in the discharge of his professional duty. I fully agree that an advocate and solicitor shall, while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interest

I

of his client, the interest of justice and dignity of the profession without regard to any unpleasant consequences either to himself or to any other person as provided by r 16 of the Legal Profession (Practice and Etiquette) Rules 1978. However, this sagacious provision must not be construed as a carte blanche to authorize an advocate and solicitor to do what he pleases under the cloak of justice and fair play. The very concept of justice envisages that the steps taken by an advocate and solicitor in the conduct of a cause are in accordance with the rule of law. In saying this I consider it necessary to refer to r 9(a) of the Legal Professional (Practice and Etiquette) Rules 1978 which reads as follows:

> An advocate and solicitor who undertakes the defence of a person in any criminal matter shall by all fair and honourable means present every defence that the law permits.

It is therefore superfluous to state that an advocate and solicitor must conduct himself in court within the confines of law. Whatever may be the duty of an advocate and solicitor to his client, his duty to the court remains paramount in the administration of justice (see *Cheah Cheng Hoc v PP*). It is perhaps with this objective in mind that r 36 of the Legal Profession (Practice and Etiquette) Rules 1978 has been worded in the following terms:

> An advocate and solicitor shall use his best efforts to prevent his client from doing things which the advocate and solicitor himself ought not to do, particularly with reference to his conduct towards courts and judicial officers, jurors, witnesses and parties. Where a client persists in such wrong-doing, the advocate and solicitor shall terminate the relationship.

It is therefore a fallacy for an advocate and solicitor to assume that just because he is acting on instructions from his client, he cannot be punished for contempt whenever he is saying or reading something based on such instructions. In *Hamilton v Anderson*, it was held that every Court possesses inherent authority to prevent contempt of its proceedings and exercises censorial power over its officers and that the legal adviser is always responsible to the court for the character of the pleadings. The Supreme Court in *Attorney General, Malaysia v Manjeet Singh Dhillon* followed the persuasive authority of the Pakistan Supreme Court case of *Yusof Ali Khan v State* [1970] PLD 350 (SC) in which it was held, inter alia, that a legal practitioner can be guilty of contempt of court even for language professedly used in discharge of his functions as an advocate. In *Jaginder Singh & Ors v Attorney General*, Raja Azlan Shah Ag LP (as High Highness then was) said in the Federal Court that it is a well established rule that advocates and solicitors in their professional capacity may, by the manner in which they conduct their cases, find themselves in contempt of court. His Lordship added at p 73:

> They are officers of the court and are answerable to the court for contumelious conduct in the discharge of their duties as such. The court has summary jurisdiction over them when acting in their professional capacity: see *Geoffrey Silver & Drake v Thomas Anthony Baines* [1971] 1 All ER 473.

In *Geoffrey Silver & Drake v Thomas Anthony Baines* [1971] 1 All ER 473, Lord Denning MR said at p 475:

> This court has from time immemorial exercised a summary jurisdiction over solicitors. They are officers of the court and are answerable to the court for anything that goes wrong in the execution of their office. Even if the solicitor has been guilty of no fault personally, but it is the fault of his clerk, he is accountable for it.

Lord Guest in delivering the advice of the Board of the Privy Council in *VW Vidyasagara v R* [1963] AC 589 said at p 596:

> In regard to the second question, whether the statement was made without sufficient reason, counsel for the appellant argued that as the appellant acted in good faith and in accordance with what he believed to be his professional duty in bringing to the notice of the court that his client had applied to the Minister of Labour to have the court reconstituted, the statement was made with sufficient reason. *It was not and could not be contended that because the appellant was acting on instructions he was entitled to any special privilege. In reading from the typewritten document he accepted responsibility for its contents.* (Emphasis added).

In commenting on *Vidyasagara*'s case, Anthony Arlidge and David Eady in their book *The Law of Contempt* (1982) said at p 190 that whilst it is the duty of counsel to pursue his client's case fearlessly, if he does overstep the mark between legitimate advocacy and contempt, it can never be an answer to say he is acting on his client's instructions. *Vidyasagara*'s case was cited with approval by the Supreme Court in *Attorney General, Malaysia v Manjeet Singh Dhillon* where Gunn Chit Tuan SCJ (as he then was) said at p 182:

> Even if the respondent was acting on instructions, he has read the statements in his affidavits and must accept responsibility for the contents (see the Privy Council case of *Vijaya Wickramatunga Vidyasagara v The Queen).*

In *Re Tulsidar Amanmal Karani* [1941] ILR Bom 548, a case involving imputation of bias against a judge, it was held that any act which would be a contempt when done by a person other than an advocate would be a contempt in his case as well for he has no special privilege or immunity. With regard to the immunity of a solicitor, Spencer Bower in his book *The Law of Actionable Defamation* (2nd Ed) said at p 345:

> It is generally thought that the right of the advocate is co-extensive with that of the party, certainly not greater, and, it may be, less. This was the view expressed in *Hodgson v Scarlett* (1818) 1 B & Ald 232 (where it is pointed out that it is usual, in practice, to allow even greater latitude to the litigant in person than to a suitor's professional representative, as a concession to the former's inexperience and ignorance), and by Lord Coleridge CJ in *Seaman v Netherclift* (1876) 2 CPD 53.

In the matter of I Sham Lal [1932] PLR 785, it was held that counsel's privilege does not extend to stating his instructions when the instructions involve an attack on the dignity of the court. It is of significant importance to note that, in particular, making statements in transfer applications scandalising the court, though the advocate and solicitor does so under

A instructions from his client, is an act of contempt. This is the ratio of the decision of the Indian Supreme Court in *MY Shareef & Anor v Hon'ble Judges of the Nagpur High Court* AIR 1955 SC 19 where Mahajan CJ in speaking for the court said at p 23:

> It cannot be denied that a section of the Bar is under an erroneous impression
> B that when a counsel is acting in the interest of his client, or in accordance with his instructions, he is discharging his legitimate duty to his client even when he signs an application or a pleading which contains matter scandalising the court. They think that when there is conflict between their obligations to the court and their duty to the client, the latter prevails.
>
> This misconception has to be rooted out by a clear and emphatic
> C pronouncement, and we think it should be widely made known that counsel who sign applications or pleadings containing matter scandalising the court without reasonably satisfying themselves about the prima facie existence of adequate grounds therefor, with a view to prevent or delay the course of justice, are themselves guilty of contempt of court, and that it is no duty of a counsel to his client to take any interest in such applications; on the other
> D hand, his duty is to advise his client for refraining from making allegations of this nature in such applications.

In *In the Matter of Babu Dwarka Mithal* AIR 1924 All 253, the duties of a counsel in applications of the nature and the allegations made as in this case were pointed out by Mears CJ at p 254:

> E Members of the legal profession are under no duty to their clients to make grave and scandalous charges either against judges or the opposite parties on the mere wish of their clients. They are not puppets compelled to obey the dictates of their clients where matters of good faith and honourable conduct are concerned. They are responsible to the court for the fair and honest conduct of a case. They are agents, not of the man who pays them, but are acting in the administration of justice, and in matters of this kind they are
> F bound to exercise an independent judgment, and to conduct themselves with a sense of personal responsibility. If they fail to act with reasonable care and caution, they are unfit to enjoy the privileges conferred upon them by law, and serious breaches must be visited with punishment.

With regard to a solicitor's duty to the court, Whyatt CJ in *Shaw & Shaw*
G *Ltd. v Lim Hock Sim (No 2)* [1958] MLJ 129 adopted a speech by Lord Tomlin given to the Canadian Bar Association in these words at p 131:

> There is, besides, the advocate's obligation to the court owed by reason of his being engaged in assisting the court properly to perform its functions. It is an obligation of frankness and candour founding that confidence reposed by the Bench in the Bar which is the most effective of all accelerators of the quick
> H flow of justice. By virtue of this obligation, the advocate must with regard to facts be careful to display accuracy in his description of the materials before the court, while presenting them in the light which seems to him most favourable to his client.

Further reference may be made to *Yee Chang & Co Ltd v NV Koninklijke*
I *Paketvaart Maatschappij* [1958] MLJ 131 where Whyatt CJ said at p 133:

> It has been said by Lord Wright in *Myers v Elman* [1940] AC 282 at p 319, that the court has a right and a duty to supervise the conduct of its solicitors

> and the court would be failing in the discharge of that duty if it passed over the conduct of the defendants' solicitors in this litigation in silence. It has been laid down by the House of Lords in *Myers v Elman* that a solicitor owes a duty to the court to conduct litigation with due propriety and to assist in the promoting in his own sphere the cause of justice. If, therefore, a solicitor becomes aware in the course of proceedings that his client is obstructing the interests of justice, it is his duty to advise his client as to the conduct which he ought to follow and if the client still persists in his wrong conduct, he should decline to act for him further.

It is thus pellucid and beyond doubt that instructions from a client are insufficient to protect an advocate and solicitor when he makes an application of the nature in this case anchored on the allegations made and he can be summarily dealt with. In the circumstances, it was my view that the explanation offered by ZZ cannot be sustained in law. I was therefore satisfied of his contempt beyond reasonable doubt and, accordingly, found him guilty.

The application to call witnesses

As I had stated earlier, ZZ had requested for an adjournment to show cause in order to adduce evidence to show that the meeting referred to by MSD did in fact take place. This requires a consideration of the circumstances in which a contemnor may be able to call witnesses in support of his case. In *Cotroni v Quebec Police Commission and Brunet* (1977) 80 DLR (3d) 490, the Canadian Supreme Court expressed the view that before the right to call witnesses can arise in proceedings of this nature, there must be facts in issue which are contestable. Pigeon J in writing for the court said at p 498:

> The appellant alleges that the Commissioners refused to allow him to summon witnesses for his defence. In my opinion, if it was conceded that the charge was sufficiently specific in the circumstances and the Commissioners could properly find proof of it in the witness's answers and his attitude before them, they were in no way obliged to do any more than listen to his explanations and the representations of his counsel before convicting him. In order to have the right to call witnesses, one must have facts to put in evidence; the appellant never indicated what facts he sought to prove by means of the witnesses he wanted to summon.

It must be observed that in proceedings for contempt in the face of the court, all the circumstances of the contempt are in the personal knowledge of the court. Thus, generally stated, the need for witnesses to be called does not arise. What is necessary is the explanation offered by the contemnor. However, there may be exceptional circumstances where the contemnor may be able to satisfy the court that witnesses to be called by him may be able to disprove the facts in the knowledge of the court. The onus is on him to indicate facts he seeks to prove by means of the witnesses he wants to summon.

The whole basis of the contempt proceeding that I had instituted against ZZ is anchored on what had transpired at the meeting between AGP and MSD based on documents filed by ZZ which I had accepted and which were comprehensive. Thus, the need to call further witnesses to show that

A the meeting did in fact take place is unnecessary as the meeting is not in dispute. I therefore refused his application for the adjournment. Having listened to the explanation of ZZ, I find further justification for having done so. ZZ's explanation did not challenge or dispute any aspect of what transpired at the meeting. This shows that his application for an adjournment to show that the meeting did in fact take place is frivolous. I
B must also add that the explanation offered by ZZ is a pure question of law and does not raise for consideration any fact that may be in dispute.

The sentence

C Before sentencing ZZ, I gave him an opportunity to make his plea in mitigation. He started off by saying that it was not his intention to commit any contempt. He then said that the motion was filed based on the SD and the letter and that the instructions of his client were also based on the same documents. He added that it was felt that this matter must be brought to the attention of the court in the interests of justice. In sentencing him, I took
D various factors into consideration. The recklessness of a contemnor is relevant to the gravity of the offence and the penalty (see *DPP v Wran* [1987] 7 NSWLR 618). The facts of this case reveal that ZZ displayed a high degree of recklessness. He had failed in his duty to the court by filing a motion without giving any consideration to its effect. In the circumstances, I was unable to accept his plea that he had no intention to
E commit contempt. Thus, the mitigating plea available to a contempt committed without any intent, as stated in *Superintendent and Remembrances of Legal Affairs Bihan v Murali Manohan Prasad* (1941) 42 CLJ 225, was not available to ZZ. In *R v Phillips (Peter)* (1983) 78 Cr App Rep 88 (CA), it was held that in considering sentence in cases of this nature, their effect on the trial is a relevant consideration. As I said earlier, the contempt in this
F case has the effect of undermining the integrity of the trial. This is a matter of serious concern as it will erode public confidence in the administration of justice. It may be pertinent to refer to the well-researched and illuminating judgment of Low Hop Bing J in *Chandra Sri Ram v Murray Hiebert* [1997] 3 CLJ Supp 518, where his Lordship highlighted the seriousness of
G contempts which seek to interfere with the due administration of justice. I also considered the attitude of ZZ in refusing to apologize notwithstanding the clear explanation of all aspects of the law and the facts of the contempt to him. As Low Hop Bing J said in *Chandra Sri Ram v Murray Hiebert* at p 561:

H > In the absence of an apology or contrition, a contemnor cannot subscribe to an expectation of a less severe sentence. On the contrary, eg in England, where the contemnor shows no remorse, he can expect to be punished more severely : *Burton v Winters* [1993] 3 All ER 847 (CA); *Brewer v Brewer* [1989] 2 FLR 251; Nigel Lowe and Brenda Sufrin, *The Law of Contempt* (1996) at p 630.

I It is appropriate to refer to *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v SM Idris & Anor and another application* [1990] 1 MLJ 273 where Abdul Hamid LP in speaking for the (then) Supreme Court said at p 277:

Finally, we must say that the court should seriously consider custodial sentence in such cases and hereby warn that in future custodial sentence might be imposed.

I was therefore of the view that in the interests of the public, a custodial sentence was essential. Accordingly, I convicted ZZ and imposed a sentence of three months imprisonment.

Contemnor convicted and sentenced to three months' imprisonment.

Reported by Andrew Christopher Simon